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RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

2004 NOV -3 A 11:52

BY COURIER

Re: MUR 5545

Dear Mr. Jordan:

November 2, 2004

On behalf of Viacom Inc. ("Viacom") and CBS Broadcasting Inc. ("CBS"), I am responding to your October 5 letter inviting comment on a complaint filed against Viacom, CBS and Dan Rather by Jeffrey S. Smith.

The complaint contends that a report about matters relating to President Bush's service in the Texas Air National Guard, which was broadcast on 60 MINUTES WEDNESDAY¹ on September 8, 2004, constituted a prohibited "expenditure" or "contribution" under the Federal Election Campaign Act (the "Act" or "FECA"). For the reasons set forth below, the Commission is without jurisdiction to consider the complaint's allegations, and it should be dismissed.

The Federal Election Campaign Act expressly excludes from its definitions of "campaign expenditure" any

news story, commentary, or editorial distributed through the facilities of any broadcasting station, . . . unless such facilities are owned or controlled by any political party, political committee, or candidate²

¹ 60 MINUTES WEDNESDAY, a weeknight edition of the original 60 MINUTES, is a weekly news magazine program, which presents a mix of investigative reports, interviews, feature segments and profiles of people in the news. Since it premiered during the 1998-99 season under the title 60 MINUTES II, the program has won numerous awards, including two Alfred I. DuPont awards and ten Emmys.

² 2 U.S.C. §§ 431 (9) (B) (i).

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The complaint argues, however, that this exclusion is not applicable here, on the ground that the 60 MINUTES WEDNESDAY segment in question constituted "propaganda" rather than a bona fide news story.

While CBS rejects complainant's characterization of the report, which was broadcast by CBS in good faith, it is unnecessary to address his allegations in the present context.³ In enacting the Federal Election Campaign Act, Congress did not intend to establish the FEC as a national arbiter of the truth and fairness of news reporting about candidates for public office. As the courts have made clear, the Commission has neither the responsibility nor the authority to determine the journalistic merit of particular news reports.

Thus, in *Reader's Digest Association v. FEC*,⁴ the court held that, where a press entity is alleged to have violated the Act, the Commission is barred from investigating the substance of the complaint "until and unless the press exemption [is] found inapplicable." In so holding, the court expressly rejected the application of any test by the agency concerning the content or preparation of a news report:

No inquiry may be addressed to sources of information, research, motivation, connection with the campaign, etc. Indeed all such investigation is permanently barred by the statute unless it is shown that the press exemption is not applicable.⁵

Similarly, in *FEC v. Multimedia Television, Inc.*,⁶ the court noted that

³ As the Commission is doubtless aware, CBS News has apologized for the inclusion in the report of certain purported memoranda, the genuineness of which has now been seriously questioned, which were attributed to Jerry Killian, President Bush's commanding officer during part of his service in the Texas Air National Guard. When CBS News found that it could not confirm the authenticity of the memos in light of those questions, it commissioned an independent investigation of how they came to be used in the report, headed by former U.S. Attorney General Richard Thornburgh and retired Associated Press CEO Lou Boccardi. That investigation is currently in progress.

⁴ 509 F. Supp. 1210, 1214-15 (S.D.N.Y. 1981).

⁵ *Id.* at 1215.

⁶ 1995 U.S. Dist. LEXIS 22404 (D. Kan. 1995).

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[t]he express exclusion of certain press entities from FECA regulation indicates the Commission has no authority to investigate protected activities. If the press exemption applies the Commission lacks jurisdiction to inquire into the substantive allegations of the complaint.

See also FEC v. Machinists Non-Partisan Political League, 655 F.2d 380, 397 (D.C. Cir.), *cert. denied*, 454 U.S. 897 (1981); *FEC v. Phillips Publishing*, 517 F. Supp. 1308, 1312 (D.D.C. 1981).

Accordingly, in considering a FECA complaint against a news organization, the FEC may in the first instance consider only "whether the press entity is owned by the political party or candidate and whether [it] was acting as a press entity" in engaging in the activities that are the subject of the complaint.⁷ This two-step procedure, under which the agency may initially consider only questions relevant to its jurisdiction, is a "necessary accommodation between . . . the Commission's duty to investigate possible violations and . . . the statutory exemption for the press combined with a First Amendment distaste for government investigations of press functions."⁸

In this case, there can be no question that CBS was "acting as a press entity" in broadcasting the 60 MINUTES WEDNESDAY report in question. The Commission is, therefore, barred by the statute from considering the allegations about the content of the report made in the complaint.

Accordingly, the complaint should be dismissed without further consideration by the Commission.

Sincerely,



Office of the General Counsel
Federal Election Commission
999 E Street
Washington, D.C. 20463
Attention: Jeff S. Jordan, Supervising Attorney
Complaints Examination & Legal Administration

⁷ *Reader's Digest Association v. FEC*, *supra*, 509 F. Supp. at 1215.

⁸ *Id.*

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**Statement of Designation of Counsel
(Respondent/Witness)**

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Name of Counsel: Howard F. Jaeckel

Firm: CBS Broadcasting Inc.

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The above named individual is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

11/2/04

Date

Howard F. Jaeckel

Signature

Name (Print): Howard F. Jaeckel, Assistant Secretary, Viacom Inc.

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Information is being sought as part of an investigation being conducted by the Federal Election Commission and the confidentiality provisions of 2 U.S.C. § 437g(a)(12)(A) apply. This section prohibits making public any investigation conducted by the Federal Election Commission without the express written consent of the person under investigation.

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